

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION**

**LELA MEEKS**

**Plaintiff**

**vs.**

**Civil Action No. 1:07CV161**

**BHEKI M. KHUMALO and  
PODIATRY INSURANCE COMPANY  
OF AMERICA**

**Defendant**

**ORDER**

This cause comes before the court on the motion of defendant Podiatry Insurance Company of America to dismiss, pursuant to Fed. R. Civ. P. 12, or alternatively, for a more definite statement. This is a medical malpractice action in which plaintiff seeks recovery for the alleged negligence of defendant Khumalo, a podiatrist, in performing surgery on her feet. Plaintiff originally filed this action in the Circuit Court of Alcorn County on May 10, 2007, and the case was timely removed to this court. In her complaint, plaintiff notes that a settlement had been reached between the parties prior to the filing of the lawsuit, but she alleges that defendants failed to make timely payment as required by the terms of their agreement. In its motion to dismiss, defendant notes that plaintiff cashed a settlement check which it submitted to her, and defendant accordingly argues that it is entitled to dismissal of this lawsuit based on the doctrine of accord and satisfaction.

The court concludes that a Rule 12 motion to dismiss is not the proper legal context for considering these issues, since defendant and plaintiffs each rely upon extrinsic exhibits,

affidavits and other proof which clearly may not be considered in the Rule 12 context. Rather, it is apparent that the issues in this case are fact-intensive ones which must be decided in the context of a Rule 56 summary judgment motion. Defendant's Rule 12 motion to dismiss is therefore due to be dismissed, and defendant should re-file its motion (if it chooses to do so) in the form of a motion for summary judgment, following the completion of any necessary discovery.

In light of the foregoing, it is ordered that defendant's motion to dismiss [5-1] is dismissed.

SO ORDERED, this the 24<sup>th</sup> day of March, 2008.

**/s/ MICHAEL P. MILLS**  
**CHIEF JUDGE**  
**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF MISSISSIPPI**